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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. 233

FIDELITY TRUST COMPANY, Trustee Under the Will of John A. Harper, Deceased, Respondent,

v.

THE COLONIAL TRUST COMPANY of Pittsburgh, Pa., Agent for the Shareholders of The Bank of Pittsburgh National Association, Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Attorneys for Petitioner.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

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(b) That the parties did not agree as to the value of the assets when they entered into an agreement of compromise; 32, 33

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. .....

FIDELITY TRUST COMPANY, Trustee Under the Will of John A. Harper, Deceased, Respondent,

v.

THE COLONIAL TRUST COMPANY of Pittsburgh, Pa., Agent for the Shareholders of The Bank of Pittsburgh National Association,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of The Colonial Trust Company of Pittsburgh, Pa., Agent for the Shareholders of The Bank of Pittsburgh National Association, respectfully shows:

MATTER INVOLVED.

The matter involved arises by reason of the suspension of business of The Bank of Pittsburgh National Association, a national bank, and the stock assessment which was imposed. Fidelity Trust Company, Trustee

Under the Will of John A. Harper, deceased, was the owner of 693, of a total of 60,000, shares of stock of that bank when it suspended business. This stock had a par value of $50 per share and a one hundred percent assessment was made against all the shareholders which, as to the Respondent, amounted to $34,650.

A claim for said assessment plus interest, being a total debt of $35,654.85, was filed with the Respondent, a decedent's estate. After the payment of administration expenses the Receiver was the only creditor of this estate and he agreed to accept all the assets of the Respondent (R. 13a, 14a), consisting entirely of marketable securities with the exception of less than $20 in cash, in settlement of his claim. The Orphans' Court of Allegheny County, Pennsylvania, by its decree of distribution, directed that all the said assets should be delivered in kind to the Receiver "in full of assessment of $50 a share on 693 shrs. Bank of Pitts. N. A." (R. 17a, 18a). This delivery was on July 8, 1932 (R. 20a). Excepted from this decree were assets sufficient to pay the administration expenses and the 693 shares of stock of The Bank of Pittsburgh National Association which were decreed back to the debtor. Had the Receiver taken these 693 shares of bank stock, which he could have done, there would not have been any possibility of this litigation.

The market value of the assets delivered to Petitioner upon the date of their receipt on July 8, 1932, was $30,159.58 as set forth in the Decree of Distribution and the Certificate of Settlement (R. 17a, 18a, 19a, 20a, 21a) which was admittedly less than the amount due the Receiver (R. 13a). The Receiver, apparently believing that title to these assets vested in him upon

delivery without any approval of the Comptroller or order of court, had them transferred to his name promptly after he received them. The Receiver decided to sell the securities the latter part of 1934 and proceeded to obtain the approval of the Comptroller to do so. He was then advised by the Comptroller that approval of the acceptance as well as the sale of these assets was required. At this time the Comptroller also said it was necessary to secure approval of a compromise which it was claimed resulted by reason of the proceedings before the Orphans' Court of Allegheny County, Pennsylvania. The approval of the acceptance and sale of the assets and of the alleged compromise was given by the Comptroller of the Currency by his letter dated January 7, 1935 (R. 15b, 16b) and an order of the District Court of the United States for the Western District of Pennsylvania was obtained on February 13, 1935 (R. 1b, 5b, 6b, 7b, 8b, 22b, 23b, 24b, 25b) when the market value of the assets plus the income therefrom paid to the Receiver amounted to $42,783.35 (R. 51a, 52a). No reason has been found as to why the Comptroller did not direct the Receiver to approve or disapprove of the transaction and proceed to obtain an order of court before these dates. Apparently the Receiver and the Comptroller were of the opinion that such approval and order of court were unnecessary under the existing circumstances because the transaction was only a payment on account or because of the Instructions of the Comptroller to Receivers hereafter discussed.

All the debts of The Bank of Pittsburgh National Association having been paid, the receivership was terminated and as of February 25, 1941, The Colonial Trust Company was elected agent for the shareholders pur-

suant to Act of Congress approved June 30, 1876, as amended (12 U. S. C. A. 197). On December 4, 1941, the remaining assets of the said The Bank of Pittsburgh National Association were turned over to that agent, your Petitioner.

The Petitioner proceeded to liquidate the assets and from the proceeds of the liquidation made partial repayments on the assessments to the shareholders in the following amounts on the following respective dates:

February 20, 1943—First partial repayment of—$3.24 per share;

February 21, 1944—Second partial repayment of—$3.00 per share;

March 3, 1945—Third partial repayment of—$6.00 per share.

No repayments, however, were made to the Respondent until those to which it otherwise would have been entitled amounted to a sum sufficient to liquidate the unpaid amount of the debt which the Petitioner claimed was due it from the Respondent; in other words, the difference between the value of the assets when delivered, which was $30,159.58, and the debt, which was $35,654.85 plus interest.

Not until November 2, 1945, or about thirteen years and four months after the delivery of the assets by the Respondent to the Receiver did the Respondent claim that it should have been treated the same as those shareholders who had paid one hundred percent of their assessment, and at that time it entered suit to recover on that basis. Respondent also claimed the excess received from the income and sale of the assets over and above the debt. It denied any obligation to pay interest on the

unpaid balance of the debt after delivery of the assets to the Receiver. The District Court entered judgment in favor of the Respondent and against Petitioner in the sum of $15,318.26, with interest from November 2, 1945. Petitioner appealed to the United States Court of Appeals for the Third Circuit which affirmed the opinion of the District Court.

Petitioner has contended that the transaction before the Orphans' Court of Allegheny County, Pennsylvania, was in law only a payment on account and therefore it was not necessary to secure the approval of the Comptroller and an order of court since the Act of February 25, 1930 (Title 12 U. S. C. A. #67)[1] only applies in case of a compromise. Petitioner has also argued in the alternative that if the Court should decide that said transaction was in fact a compromise, then that compromise was converted to writing in the form of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania (R. 17a, 18a, 19a) and the Comptroller approved it (R. 15b, 16b) and the District Court ordered that it be carried out on the basis set forth in that decree (R. 22b, 23b, 24b, 25b).

Petitioner has paid the Respondent on the basis of the compromise set forth in the said Decree of Distribution in the Orphans' Court entered May 24, 1932, but Respondent asks that it be paid on the basis of values

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[1] Act of February 25, 1930 (Title 12 U. S. C. A. #67) provides as follows:

"Any receiver of a national banking association is authorized, with the approval of the Comptroller of the Currency and upon the order of a court of record of competent jurisdiction, to compromise either before or after judgment, the individual liability of any shareholder of such association."

prevailing on February 13, 1935, the date of the decree of the District Court, contending that the compromise was not effective until the latter date.

Briefly, Petitioner claims that the negotiations between the parties in 1932 resulted only in a payment on account and that therefore title to the assets vested in Petitioner upon delivery. In the alternative, Petitioner also contends that if it should be decided that there was, in 1932, a compromise of the claim then that compromise was converted to writing in the form of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania (R. 17a, 18a, 19a) and in that form the compromise was approved by the Comptroller and an order of court was obtained directing that it be effected on the basis of the values set forth in that decree (R. 22b, 23b, 24b, 25b). Respondent argues that there was no payment on account and that since there was no order of court until February 13, 1935, the compromise agreement made by the parties in 1932 and converted to writing in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, did not become effective until the said date of February 13, 1935. Under this theory it is contended that the values on February 13, 1935, would be controlling rather than those agreed to as of May 24, 1932 by the parties and set forth in the said Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, #1, 43 Stat. 938; U. S. C. A., Title 28, Section 347.

QUESTIONS PRESENTED.

I.

If it was necessary to obtain from the United States District Court authorization to accept assets in accordance with a decree of the Orphans' Court of Allegheny County, Pennsylvania, and such authorization was in fact obtained, the question is, which is the controlling date:

May 24, 1932, the date of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, which evidenced the agreement of compromise between the parties,

or

February 13, 1935, the date of the order of the District Court of the United States for the Western District of Pennsylvania, directing the Receiver to accept the assets in accordance with the Decree of the Orphans' Court of Allegheny County, Pennsylvania?

II.

If the approval of the compromise by the District Court was necessary, should the Respondent be charged with interest to the date of such approval?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

Petitioner respectfully submits that the decision of the United States Court of Appeals for the Third Circuit should be brought before this Court for review for the following reasons:

(1) The questions involved are of paramount importance in the administration of the national banking laws and have not been, but should be, settled by this Court.

Where the consideration in a compromise between a Receiver of a national bank and a debtor is property, other than money, it has never been decided whether that property should be valued as of the date of the agreement of compromise between the parties or the date of the order of court directing that the compromise agreed to by the parties be effected. To assist receivers in the performance of their duties this question should be decided. In this case there is the further question of whether or not the agreement of the parties should be controlling rather than the date of the order of the District Court.

(2) The majority opinion of the learned United States Court of Appeals conflicts in principle with the case of *Griggs et al. v. Baumer,* 130 Fed. (2d) 399 (C. C. A. 3, 1942) and *Karn v. Andresen et al.,* 51 Fed. (2d) 521 (District Court, D. Minnesota, Sixth Division, 1931).

(3) The majority opinion of the learned United States Court of Appeals is contrary to law and

works an injustice and is inequitable to the many shareholders other than the Respondent. The opinion of the United States Court of Appeals is in error in concluding among other things the following:

(a) That Petitioner has refused to pay all the shareholders in the same way;

(b) That the parties did not agree as to the value of the assets when they entered into an agreement of compromise;

(c) That the function of an order of court is to, in effect, make an agreement of compromise for the parties rather than order that an agreement previously made by the parties be carried out;

(d) That because the Receiver held the assets more than 2½ years before requesting approval of the settlement the equitable result would have the increase in value inure to the benefit of the Respondent;

(e) That the Petitioner should be penalized for the derelictions of the Receiver and the Comptroller in holding the assets for that length of time;

(f) That the decree of the Orphans' Court of Allegheny County, Pennsylvania, and the order of the District Court can be collaterally attacked;

(g) And that Petitioner is not entitled to interest from May 16, 1932, to February 13, 1935.

(4) The majority opinion of the learned United States Court of Appeals is contrary to "Instructions to National Bank Receivers" in accordance with which the assets in the posses-

sion of receivers of national banks have heretofore been administered.

(5) The majority opinion of the learned United States Court of Appeals entirely ignores the fact that under their opinion they were without jurisdiction.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari may issue out of and under the Seal of this Court, directed to the United States Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court, on a date to be designated, a full and complete transcript of the record of all proceedings in said United States Court of Appeals in the case entitled "Fidelity Trust Company, Trustee Under the Will of John A. Harper, Deceased, Plaintiff, Appellee v. The Colonial Trust Company of Pittsburgh, Pa., Agent for the Shareholdres of The Bank of Pittsburgh National Association, Defendant, Appellant, No. 9708," filed May 6, 1949, to the end that said case may be reviewed and determined by this Court; that the judgment and order of the United States Court of Appeals for the Third Circuit may be reversed by this Court and that your Petitioner may have such other and further relief as to this Court may seem proper.

Respectfully submitted,

THE COLONIAL TRUST COMPANY OF PITTSBURGH, PA., AGENT FOR THE SHAREHOLDERS OF THE BANK OF PITTSBURGH NATIONAL ASSOCIATION

By: C. ROSCOE HOFFMAN,

By: RICHARD W. AHLERS.

Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW.

The opinion of the District Court (Gibson, J.) was filed February 23, 1948 and appears in the record at 39a but is not officially reported.

The opinion of the majority and the dissenting opinion of Judge O'Connell of the United States Court of Appeals for the Third Cirucit were filed May 6, 1949 but have not yet been officially reported.

JURISDICTION.

The judgment sought to be reviewed is a final judgment of the United States Court of Appeals for the Third Circuit affirming a decision of the District Court of the United States for the Western District of Pennsylvania. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, C. 229, #1, 43 Stat. 938; U. S. C. A., Title 28, Section 347.

STATEMENT.

The essential facts are summarized in the Petition for Certiorari under the title "Matter Involved", *supra.*

SPECIFICATIONS OF ERROR.

1. The learned United States Court of Appeals for the Third Circuit erred in holding that the value of the assets should be taken as of February 13, 1935, the date of the order of the District Court.

2. The learned United States Court of Appeals for the Third Circuit erred in refusing to hold that the assets should have been valued in accordance with the valuations agreed to by the parties and set forth in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, dated May 24, 1932.

3. The learned United States Court of Appeals for the Third Circuit erred in refusing to hold that it was proper for Petitioner to charge Respondent interest on the unpaid balance of the debt from May 16, 1932, the date when all the assets of the Harper Estate were turned over to the Receiver, to February 13, 1935, the date of the order of the District Court.

SUMMARY OF ARGUMENT.

(a) The parties themselves agreed to the compromise proposition which included values of the assets. This agreement was converted to writing in the form of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania. The Comptroller of the Currency approved the compromise proposition and an order of the District Court was obtained expressly directing that the compromise be consummated in accordance with the said decree of the Orphans' Court. The Respondent never withdrew his offer of compromise and never demanded the return of the assets. Therefore, after the order of the District Court was obtained, the proceedings could not be collaterally attacked. Under this theory of the case the compromise became effective on February 13, 1935, the date of the order of the District Court, but the consummation of the compromise was in accordance with the terms of the agreement between the parties set forth in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania.

(b) The transaction between the parties was only a payment on account and therefore no approval of the Comptroller of the Currency or order of court was required. The reason for this is that a value was placed upon the assets when they were delivered to Petitioner and under such circumstances delivery in law is the equivalent of the payment of so much money. If this argument is sustained the title to the assets vested in Petitioner upon delivery on July 8, 1932, without the necessity of obtaining the approval of the Comptroller of the Currency or an order of court.

(c) If it should be decided that there was a compromise, Petitioner is entitled to interest on the unpaid balance of the debt from May 16, 1932 to February 13, 1935, for the reason that in such case it was legally impossible for Petitioner to sell the assets before the latter date and, consequently, no funds were available to liquidate the indebtedness. To hold otherwise would be inequitable to those shareholders who paid their assessments on time and in cash and to those who, by agreement with the Comptroller, paid their assessments on a quarterly basis. Those in the last mentioned category were even charged interest on their unpaid balances.

ARGUMENT.

I.

The questions involved are of paramount importance in the administration of the national banking laws and have not been, but should be, settled by this Court.

The Respondent insists that there was a compromise in this case. In a compromise the debtor negotiates with the receiver and effects a compromise agreement. The statute then provides that the Comptroller of the Currency must approve this compromise agreement and that then an order of court of competent jurisdiction must be obtained. In other words, in practice the terms of the compromise agreement made by the debtor and the Receiver are approved by the Comptroller and the order of court then authorizes and directs the Receiver to consummate the transaction in accordance with the terms of that compromise agreement. If the agreement of compromise provides that assets other than money are to be turned over, as was done in this case, Petitioner contends that the values agreed to by the parties in the form of the compromise agreement and converted to writing in the Decree of Distribution on May 24, 1932, are the proper amounts of credit to be given the debtor. The learned United States Court of Appeals, on the other hand, decided that the debtor should be credited with the values prevailing at the time the order of the District Court was signed on February 13, 1935, because the compromise was not effective until that time. But this would mean that the parties intended that the compromise was to be effective on the basis of values at

some future undetermined time and there is absolutely nothing in this record to indicate that the parties had any such intention.

If the date of the order of the District Court, and not the date of agreement of compromise between the parties, is to be taken as the controlling date, then it would be practically impossible for a receiver of a national bank to administer his trust. Receivers were generally instructed to accumulate cases and the Comptroller's letters often read that "you will include in some future petition to be presented to the court in connection with other completed matters, a request for the approval of the court." An illustration of the last quotation can be found in R. 20b. If court orders are to be the controlling factor instead of merely being approval of a contract or agreement previously entered into by the parties it means that in future receiverships it will be necessary for receivers to be in court every day a compromise is negotiated. This would be an impossibility because of the time required in obtaining the approval of the Comptroller and an order of court.

When a debtor presents a compromise proposition which is acceptable to the Receiver it is first sent to the Comptroller of the Currency for approval. Sometimes, during the thirties, when this case arose, because of the conditions of the times and the resulting large volume of work which the Comptroller was called upon to perform, it took a month or longer before a reply was received. If and when approval of the Comptroller was had, the receiver then turned over the compromise agreement with that approval to legal counsel for the preparation of a petition to be presented to court for

authority to execute the agreement of compromise. This step also frequently required considerable time. If the critical time is the date of the court order, it necessarily follows that much time will elapse between the time when the compromise offer is received from the debtor and the signing of the order of court. Where assets other than money are transferred in liquidation of a debt, due to the fluctuation of security values during that interim, the parties themselves would never be making the agreement. It would depend upon when the lawyer presented the petition and when the order of court was signed. And, as said by Judge O'Connell in his dissenting opinion, "By adopting such a date, we have the incongruous result that neither the stockholder nor the Comptroller of the Currency has the slightest idea of the values they are said to have agreed upon until the court actually signs the decree, probably days or weeks later; and the court likewise, unless it consults the ticker-tape, is at sea at the time of entering the decree."

Before the Comptroller approves a compromise proposition made by a debtor it would, of course, be necessary for him to have available information disclosing just what the proposition of the debtor was. Otherwise, the Comptroller would never know what he was approving. In this case, the Comptroller stated in his letter of approval (R. 15b) that the assets were delivered to the Receiver pursuant to a decree of the Orphans' Court. It is therefore respectfully submitted that the Comptroller was familiar with the details of the decree and when he approved the transaction he also approved these values as a part of the transaction.

However, in connection with the value of the assets transferred by the Respondent to the Petitioner in this case, the majority opinion of the learned United States Court of Appeals says that "we do not find that the parties made any valuation here. An Orphans' Court inventory indicates no agreement by a creditor that the property was worth what the inventory showed." Of course, and Petitioner has never at any time during this dispute contended that the inventory indicated any agreement. It justifies its contention for several other reasons. First, there is the colloquy between counsel for the Respondent and the Receiver at the time of the audit of the account of Respondent before the Orphans' Court of Allegheny County, Pennsylvania, which is set forth in footnote 1 of the dissenting opinion of Judge O'Connell in this case and which is as follows:

> "1 *Mr. Stoner* (counsel for estate): The assets of the estate are several thousand dollars less than an amount sufficient to pay the Receiver of the Bank of Pittsburgh N. A., but I understand Mr. Frazer, representing the Receiver, is prepared to put upon the record the fact that he will accept the securities composing this trust, other than the Bank of Pittsburgh stock, in full of the liability of the trust to the Bank of Pittsburgh, Receiver Mr. C. O. Thomas.
>
> "*Mr. Frazer* (counsel for receiver): That is right. The amount of the claim is $34,650 and interest to date amounts to $1004.85, a total of $35,654.85. The Receiver will accept the securities in the estate in satisfaction of his claim."

Also, Respondent informed the parties interested in the Harper Estate that the value of the assets was

less than the debt due the Receiver. This is set forth in footnote 2 of the said dissenting opinion of Judge O'Connell and reads as follows:

"2 The market value of the securities shown to be on hand, listed on pages 2 and 3 of the account, is less than the claim of the Receiver for the Bank of Pittsburgh, N. A. Fidelity Trust Company notified Alberta Harper Irish, Florence Harper Byram and Lydia E. H. Brush, children of John A. Harper and the life tenants under his will, that the Receiver of the Bank of Pittsburgh, N. A. would appear at the audit of this account on May 1, 1932 and would bid up to $34,650 with interest, for the securities shown to be in the hands of the Trustees, exclusive of The Bank of Pittsburgh stock, and that if they cared to bid more than that amount they should so inform the accountants or appear at the audit and make an offer therefor. A list of the securities, together with the present market value, is attached hereto and marked Exhibit 'A'."

Further, since this compromise involved the delivery of assets of a decedent's estate over which the Orphans' Court of Allegheny County, Pennsylvania, had exclusive jurisdiction, the Respondent was without authority to make delivery thereof unless the compromise was made a part of the decree of distribution of the said Court and that Court ordered that such delivery be made. This was done and, as it relates to the transaction here involved, said decree is as follows:

"DECREE

And now, to wit, May 24th, 1932, the account in this case having been filed and confirmed nisi,

and having been examined and audited by the Court, upon consideration thereof, it is agreed that the account be confirmed absolutely and that the funds in the hands of the accountant, to wit, $32,759.12, be paid in accordance with the schedule of distribution hereto attached and made a part hereof, unless exceptions be filed within ten days.

PER CURIAM.

Balance Per First Account filed		127043.05	
			$32,759.12
Deficit per supplemental audit statement	177.13		
Reduction in value of securities to conform to market values at 5/14/32	16407.80		
Reduction in carrying values of 693 shrs. Bank of Pittsburgh N. A. owing to Bank failure per supplemental audit statement filed	77699.00	94283.93	
Balance for Distribution			$32,759.12
To Fidelity Trust Company, Compensation Principal-Personalty 2% comm. on $92,363.84	1847.27		
Principal-Realty 2% Commission on $37,563.34	751.27		
		2598.54	

To Fidelity Trust Company, Trustee in trust for purposes specified in will, viz:	
693 shrs. Bank of Pittsburgh, N. A.	1.00
To C. O. Thomas, Rec. of Bk. of Pitts. N. A. Balance in full of assessment of $50 a share on 693 shrs. Bank of Pitts. N. A.	
13 shrs. General Cable Corp. Class A @ 1½	19.50
43 shrs. General Cable Corp. Class A Warrants	0.00
144 shrs. General Cable Corp. Common @ ¾	108.00
43 shrs. General Cable Corp. 7% Pfd. @ 6⅛	263.38
20 shrs. Pittsburgh Coal Co. Pfd. @ 20	400.00
$6500 Bds. General Cable Corp. 5½% 1st Mtge. Series A due 7/1/48 @ 43¾	2843.75
$ 600 Bds. Chicago, Milwaukee, St. Paul and Pacific Railroad Co. 5% 50 yr. Mtge. due 2/1/75 @ 20	120.00

$2400 Bds. Chicago, Milwaukee, St. Paul and Pacific Railroad Co. 5% Conv. Adj. Mtge. due 1/1/2000 @ 4	96.00		
$3000 Bds. Pittsburgh & Allegheny Telephone Co. 5% 1st Mtg. due 12/1/49 @ 100½	3015.00		
$2000 Bds. Pittsburgh Terminal Warehouse and Transfer Company 5% 1st. Ref. Mtge. 30 yr. due 11/1/36 @ 10	200.00		
$3000 Bds. Southern Rwy. Co. 6½% Deb. and Gen. Mtge. due 4/11/56 @ 30	900.00		
$2000 Bds. West Penn Power Co. 5% 1st Mtge. Series "E" due 3/1/63 @ 101¼	2025.00		
Interest in the following participation mortgages:			
Installment Mtge. Fund 6%	16150.00		
A. Shapiro Mortgage 6%	4000.00		
Cash	18.95	30159.58	
			$32,759.12"

It is respectfully submitted that all prior negotiations of the parties were merged in this decree and this decree therefore represents the agreement of the parties converted to writing.

Additional evidence of the agreement as to the values of the assets is contained in a letter from Mr. A. P. Reed, then Vice President of Fidelity Trust Company, the Respondent, to the Comptroller of the Currency, dated July 8, 1932 (R. 20a, 21a), which is as follows:

"CERTIFICATE OF SETTLEMENT OR SALE

July 8, 1932

Comptroller of the Currency
Washington, D. C.

Sir:

Under an agreement of settlement made with C. O. Thomas, Receiver of The Bank of Pittsburgh, N. A., Pittsburgh, Pennsylvania, we hereby certify that on July 8, 1932, we delivered to said Receiver the sum of $18.95 in cash and securities listed below awarded under decree filed in Orphans' Court of Allegheny County to No. 205 January Term, 1932:

13 shrs.	General Cable Corp. Class "A" @ 1½	$ 19.50
43 shrs.	General Cable Corp. Class "A" Warrants	0.00
144 shrs.	General Cable Corp. Common @ ¾	108.00
43 shrs.	General Cable Corp. Preferred @ 6⅛	263.38

20 shrs.	Pittsburgh Coal Co. Pfd. @ 20	400.00
$6500 Bonds	Gen. Cable Corp. 5½s 47 "A" @ 43¾	2,843.75
600 Bonds	Chic. Milwau. St. P. & Pac. 5s 75 @ 20	120.00
2400 Bonds	Chic. Milwau. St. P. & Pac. 2000 @ 4	96.00
3000 Bonds	Pgh. & Alle. Tel. 1st M. 5s 49 @ 100½	3,015.00
2000 Bonds	Pgh. Terminal Warehouse & Trans. Co. 5% 1st Ref. Mtge. 36 @ 10	200.00
3000 Bonds	Southern Ry. Co. 6½% Deb. & G. M. 56	900.00
2000 Bonds	West Penn Power Co. 5% 1st Mtg. Ser. "E" 63	2,025.00
	Interest in the following Participation Mortgages	
Installment Mortgage Fund 6%		16,150.00
A. Shapiro Mortgage 6%		4,000.00
Cash		18.95
		$30,159.58

In full settlement of the stock assessment liability of the Estate of John A. Harper, Deceased, as owner of 693 shares stock @ $50 per share—$34,650.000.

Respectfully,

A. P. REED"

By this commnication Respondent certainly agreed to the stated values of each of the assets involved. Surely, the foregoing is ample proof of the contention of the Petitioner that the parties actually did agree as to the values of the assets to be turned over in compromise of the claim and Judge O'Connell so decided in his dissenting opinion.

Where parties to a dispute fix a value to the property transferred in compromise of a claim the delivery of that property in law is equivalent to the payment of that much money (Volume 1, Cyclopedia Law and Procedure 335; Griffith v. Creighton, 81 Mo. App. 1; Volume 1 American and English Encyclopedia of Law, Second Edition, 418; Howard et al. v. Norton, 65 Barb. (N. Y.) 161), and in this case that would have resulted only in a payment on account so that no approval of the Comptroller and no order of court would have been required. In Pennsylvania, payment of a debt by the delivery of specific articles, not money, is recognized (Hamilton v. Moore, 4 W. & S. 570; Richabaugh v. Dugan, 7 Barr. 394; Heath v. Page, 48 Pa., 130 at 143).

If the Respondent did not intend that the assets should be delivered at the stated prices, why did it notify the interested parties in the Harper Estate that the value of these assets was less than the debt and that they would be turned over to the Receiver unless a bid was made by said parties in an amount greater than the bid of the Receiver and that if they wished to make such a higher bid they should appear at the audit and do so (R. 16a). Also, as said in the dissenting opinion of Judge O'Connell:

"It is not inapposite to note that, had the Harper Estate and the Receiver not intended such values to

be binding upon all interested parties, the trustee of the estate could and should have liquidated the assets so as to have a fund to apply on account of the debt due the Receiver."

It is therefore respectfully contended that there was, in fact, an agreement between the debtor and the Receiver as to the value of the assets to be turned over in settlement of the claim. This agreement was a part of the compromise proposition made by the debtor to the Receiver which was converted to writing in the form of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania. This proposition, as an offer of compromise, was never terminated by the Respondent. In accordance with the applicable rule set forth in the Restatement of the Law of Contracts, Section 34, the offer of compromise, "until terminated gives to the offeree a continuing power to create a new contract by acceptance of the offer." This offer was approved by the Comptroller and an order of court directed the Receiver to effect this compromise proposition. The terms of this compromise agreement, including the values placed upon the assets by the parties, were executed and the transaction was completed. The order of the District Court directing that the compromise be effected provided that the Receiver should accept the assets "in accordance with the decree of the Orphans' Court in and for Allegheny County, Penna., at No. 205 January Term, 1932." The substance of that decree, which includes the value of the assets, as it is pertinent to this case, appears in R. 17a, 18a and 19a. It also is heretofore set forth on page 20 and may be found at footnote 3 of the dissenting opinion of Judge O'Connell.

Judge O'Connell stated in substance that this compromise agreement was sanctioned by the Orphans' Court of Allegheny County, Pennsylvania, and the District Court then directed that it be carried out. Therefore, it may not be attacked, modified or changed in a subsequent collateral proceeding. Furthermore, since the compromise proposition was included in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, if that proposition is to be changed in any way it would then first be necessary to have this decree of distribution amended.

It is respectfully submitted that when consideration is given to the fact that one of the parties was a large trust company, as Trustee, in the City of Pittsburgh, and the other a receiver of a large national bank which had suspended business, it is most difficult, if not impossible, to conclude that such parties did not take into consideration the value of the assets, amounting to more than $30,000, at the time of their transfer. As said by Judge O'Connell in his dissenting opinion, "I cannot believe that a compromise was effected with an understanding that the value of the assets was to be subsequently determined by their market value on whatever date the District Court approving the compromise happened to take statutory action." Especially is this true, having in mind the contents of footnote 4 in the dissenting opinion of Judge O'Connell, which reads as follows:

"4 I point out in passing that, by virtue of the provisions of 12 U.S.C. #197, 12 U.S.C.A. #197, the parties before us are, in effect, the same as those which engaged in the extensive negotiations culminating in the 1935 court order. It was the Harper

estate which tendered the assets at stated values in compromise. The Harper estate advised the Orphans' Court, with a detailed list, that the assets were smaller than the assessment. The Harper estate was aware that the beneficiaries, to keep the assets, had to bid a sum greater than the assessment. The Harper estate advised the Comptroller that the assets as valued were "in full settlement." The Harper estate made no move to block the approval of the Comptroller or authorization of the district court. The liquidation of the closed bank was conducted throughout upon the theory that the Harper estate had discharged its liability by an 85% payment in settlement. Why should a court now intervene and permit the Harper estate even to assert a value contrary to that which it has itself assigned over a period of years? Cf. the principles of collateral estoppel and law of the case."

In fact, what more than they did do could the parties have done to evidence an agreement as to the value of the assets involved. Certainly, they furnished such ample proof of an understanding in this regard that it cannot now be questioned.

If the decision of the learned United States Court of Appeals should be sustained in this case then it is most respectfully submitted that the court, rather than the parties themselves, would have made the compromise proposition. This is true for the reason that the parties did agree to the values as of May 24, 1932, as heretofore set forth, and then the court changed that agreement by substituting different values as of February 13, 1935. This should not be done because the cases expressly set forth that a court, in approving compromise

propositions, merely acts in an administrative capacity. In other words, it only directs that an agreement already made be carried out and may not itself make an agreement for the parties. *Mitchell v. Joseph,* 117 F. 2d, 253, 255 (C. A. 7, 1941). See also *Hulse v. Argetsinger,* 18 F. 2d, 944, 945 (C. A. 2, 1927); *Griggs v. Baumer,* 130 F. 2d, 899, 901 (C. A. 3, 1942); and *Oosterhuis v. Palmer,* 137 F. 2d 322, 325 (C. A. 1943). If the present decision prevails, it will have a decided effect upon all other compromises made by a national bank receiver where assets other than money are turned over to the receiver.

II.

The majority opinion of the learned United States Court of Appeals conflicts in principle with the case of Griggs et al. v. Baumer, 130 Fed. (2d) 399 (C. C. A. 3, 1942) and Karn v. Andresen et al., 51 Fed. (2d) 521 (District Court, D, Minnesota, Sixth Division, 1931).

It is respectfully requested that it be kept in mind that the compromise proposition in this case, which was converted to writing in the form of a Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, set forth the values at which the assets were to be transferred to the Petitioner pursuant to that decree of distribution. This decree is as follows:

"And now, to wit, May 24th, 1932, the account in this case having been filed and confirmed nisi, and having been examined and audited by the Court, upon consideration thereof, it is agreed that the account be confirmed absolutely, and that the funds in the hands of the accountant, to wit, $32,759.12, be paid in accordance with the schedule of distribution hereto

attached and made part hereof, unless exceptions be filed within ten days.

Per Curiam."

Then follows a detailed list of the assets with their respective values totaling $32,759.12, of which the Receiver of The Bank of Pittsburgh National Association was decreed $30,159.58.[2] Thereafter, the District Court of the United States for the Western District of Pennsylvania ordered that the Receiver should accept these assets in accordance with this decree of distribution. Now, in this proceeding, the Respondent is endeavoring to change those terms of the compromise. In other words, the Respondent is attempting to have the compromise made on a basis much different from that set forth in said decree of distribution, to which the parties had agreed and which was approved by the Comptroller and ordered to be effected by the said District Court. In the said case of *Griggs v. Baumer,* in speaking of the order directing the receiver to consummate a compromise proposition, the court said:

"Once such an order is signed, the purchaser named therein is entitled to rely upon it, and the court cannot in the absence of fraud or mistake rescind that order, even for the laudable purpose of securing for the creditors and stockholders of the bank a substantial increase in the price of the assets sold."

In the instant case a compromise proposition was made by the debtor to the Receiver. That proposition was transmitted to the Comptroller who approved it and the Receiver secured an order of court directing the

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[2] See page 20 for decree of distribution in detail.

Receiver to give effect to the compromise. All this was done without the debtor ever having indicated any thought of withdrawing his compromise proposition. This proposition, converted to writing in the form of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, as heretofore set forth, contained stated values of all the assets. Under these circumstances, it is pertinent to give consideration to a portion of the opinion of the said case of *Karn v. Andresen* which reads as follows:

> "I find, however, from the evidence, that the offer made by the plaintiff to the receiver, in settlement of all claims made against him by the receiver growing out of his acceptance as a director of the bank, was accepted by the receiver, approved by the state district court, and Dr. Karn notified of its acceptance, prior to any attempt on his part to withdraw the offer, and that all that remained to be done were the formal and ministerial acts of signing the covenant not to sue and transferring the receiver's certificates. These acts would only be evidence of the agreement, and not the agreement itself.
>
> "Had Dr. Karn withdrawn his offer at any time prior to its approval by the court, the situation would have been different."

III.

The majority opinion of the learned United States Court of Appeals is contrary to law and works an injustice and is inequitable to the many shareholders other than the Respondent. The opinion of the United States Court of Appeals is in error in concluding, among other things, the following:

(a) That Petitioner has refused to pay all the shareholders in the same way;

(b) That the parties did not agree as to the value of the assets when they entered into an agreement of compromise;

(c) That the function of an order of court is to, in effect, make an agreement of compromise for the parties rather than order that an agreement previously made by the parties be carried out;

(d) That because the Receiver held the assets more than 2½ years before requesting approval of the settlement the equitable result would have the increase in value inure to the benefit of the Respondent;

(e) That the Petitioner should be penalized for the derelictions of the Receiver and the Comptroller in holding the assets for that length of time.

(f) That the decree of the Orphans' Court of Allegheny County, Pennsylvania, and the order of the District Court can be collaterally attacked;

(g) And that Petitioner is not entitled to interest from May 16, 1932 to February 13, 1935.

The majority opinion, in part, contains the following language:

> "The appellant's argument in justification of its refusal to pay the trustee of the Harper estate in the same way it has paid dividends to the other shareholders of the defunct bank rests on the doctrine of consideration at common law."

If the learned Court intended to convey the impression that Petitioner was not paying Respondent on the same basis as it paid all other shareholders, it is altogether incorrect as all shareholders in the same category as Respondent have been paid in accordance with the same method of computation as that for which the Petitioner is contending in this case.

The majority opinion of the learned United States Court of Appeals is altogether predicated upon the assumption that the parties did not agree as to the values of the assets when they were turned over to the Petitioner. For the reasons heretofore set forth, and especially those contained in the dissenting opinion of Judge O'Connell, it is respectfully submitted that there actually was such an agreement as to the value of the property decreed and delivered to Petitioner. In fact, what other evidence of an agreement as to values could possibly have been furnished by the parties than those set forth in this case?

The only reason assigned by the said majority opinion of the Court for its decision that there was no agreement as to values is that an Orphans' Court "inventory" indicates no agreement by a creditor that the property was worth what the inventory showed. Of course, this is true, but the Petitioner has never con-

tended otherwise. Petitioner has only argued that the values set forth in the decree of distribution which evidenced the agreement of the parties as to the terms of the compromise, rather than those in the inventory, were agreed to and Judge O'Connell so found. Nothing is said in the majority opinion about the values set forth in the decree of distribution and those in the Certificate of Settlement or Sale, the latter of which was signed by the Respondent, and therefore certainly agreed to by it (R. 20a). Also, nothing whatsoever is said in the majority opinion about the other agreements as to values set forth in the dissenting opinion of Judge O'Connell. Furthermore, in this case the values in the inventory were decreased in the decree of distribution so as to conform to the actual values on the date of the audit in the Orphans' Court[3] so that, if it is decided that the parties agreed to the values in the inventory as the

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[3] DECREE OF DISTRIBUTION

Balance per First Account filed		127043.05	
Deficit per supplemental audit statement	177.13		$32,759.12
Reduction in value of securities to conform with market values at 5/14/32	16407.80		
Reduction in carrying value of 693 shrs. Bank of Pittsburgh N.A. owing to bank failure per supplemental audit statement filed	77699.00	94283.93	
Balance for Distribution			$32,759.12"

worth of the assets they were evaluating the assets on a basis other than the actual market values at the time. This, they certainly would not have done.

The majority opinion of the learned United States Court of Appeals states that it is not an easy question to determine when the compromise in this case became effective. The said opinion further states that "A strong argument can be made that the approval, when given, validates the settlement as of the time the Receiver and shareholder made it." It was concluded, however, that the compromise was to be given effect as of the date of the decree of the District Court on February 13, 1935, rather than on the basis of the agreement of the parties set forth in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, dated May 24, 1932. The said opinion likewise states that this result is harmonius with the wording of the statute and that it recognizes the status of the Comptroller of the Currency as the Federal official primarily responsible for the conduct of the receivership. It is also said that the Comptroller's regulations specifically indicate this official's understanding that final statutory approval must precede an effective compromise. No objection can be made to any of these assertions. However, they are equally true if the agreement of compromise made by the parties, as evidenced by the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, dated May 24, 1932, is effective. In either event, whether it is the date of the order of the District Court on February 13, 1935, or May 24, 1932, the date of the Decree of the Orphans' Court of Allegheny County, Pennsylvania, which set forth the agreement of the parties, it would be harmonious with the

wording of the statute and it recognizes the status of the Comptroller as the authority primarily responsible for the conduct of the receivership.

Of course, a compromise made by a national bank receiver is not effective until an order of court is obtained, but the question then is, not *when* it becomes effective but *what* becomes effective; in other words, *what* were the terms of the compromise approved by the Comptroller and ordered to be effected by the District Court. The statute provides that the Comptroller shall "approve" the compromise proposition. The word "approve", it is respectfully submitted, presupposes that sanction is being given to something already done. If the values are to be taken as of the date of the order of court then, in reality, the Comptroller would be approving something to take place in the future and the Court would be making a new agreement. Simply to approve the acceptance of securities without an understanding as to values is to perform a meaningless act because it is not known what is being approved unless and until a value is placed upon the assets.

The said opinion further states that an analogy may be drawn to the case of a receiver in bankruptcy whose proposed sale of property of a bankrupt estate does not become effective until court approval is obtained. But when the court approval is secured the sale is consummated on the terms of the "proposed sale" and surely a court should not approve a sale without knowing what the terms of that sale were. The order of the District Court, in this case, was that the Receiver should accept the assets "in accordance with the decree of the Orphans' Court in and for Allegheny County, Penna., at No.

205 January Term, 1932," and in that decree the value of the assets is set forth in great detail. The court states that Petitioner concedes that the compromise settlement has but the effect of an offer until statutory approval is given but, again, it is respectfully submitted that the question then arises as to *what* the terms of the offer were. In this connection the Court says that its position supports a conclusion that the time the "bargain" became effective was the time when the order of court was signed but still the question remains as to *what* the terms of the "bargain" were.

The said opinion of the learned United States Court of Appeals continues as follows:

> "Moreover, in this case, the Receiver took over all of the Harper assets and held them for more than 2½ years before requesting approval of the settlement. If the securities had declined in value and the Comptroller had disapproved the settlement, there is no doubt that the Harper estate would have continued liable to the Receiver for the deficiency in the payment of its assessment. It seems to us the equitable result that the increase in value which occurred during that time should accrue to the benefit of the shareholder."

It is respectfully submitted that the Receiver, in this case, should not be criticized for holding the assets for more than 2½ years before requesting approval because it is reasonable to conclude that both parties were of the opinion that such approval was unnecssary. Whether the Receiver held the assets one day or 2½ years is unimportant because, if the theory of the Respondent is accepted, it would have been entitled to any

appreciation in values and therefore could not possibly have suffered any loss. On the other hand, if the theory of Petitioner is accepted, title vested immediately upon delivery of the assets on May 24, 1932, or ten days thereafter allowed for exceptions, or on the date of the order of the District Court in February, 1935, but at the values agreed upon by the parties and set forth in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania. Then, in the event of any appreciation over and above the values set forth in the decree of distribution, it would have inured to the benefit of the Petitioner as Respondent was not entitled thereto by reason of his having agreed to the values at which the assets should vest in Petitioner. Therefore, any criticism of the Receiver by the Respondent for not having obtained approval of the settlement sooner is not justified.

In this last quotation from the majority opinion of the learned United States Court of Appeals reference is made to a supposition that the Comptroller might disapprove of a settlement where the assets had declined in value. In this case the Receiver was given all the assets which the Respondent had. Under these circumstances, it is respectfully submitted that it is inconceivable that the Comptroller would not have approved the transaction. He could not have accomplished anything by withholding his approval because he could not possibly have secured any additional assets. This is supported by the dissenting opinion of Judge O'Connell when he states in part that:

> "I find it difficult to believe that any district court would, or could, in the exercise of its discretion refuse to approve a compromise agreement made in good faith between a receiver of a national bank

and a stockholder under which such debtor turned over to the receiver securities having a readily ascertainable market value, even where the receiver or Comptroller delayed an unreasonable length of time between the receipt of such securities and the seeking of approval of the compromise agreement by the district court and, in the interim, the market value of the securities declined."

As set forth in footnote 8 to the majority opinion of the learned United States Court of Appeals, the debtor is charged with notice that a receiver of a national bank must secure the approval of the Comptroller and an order of court when a compromise is made. It is respectfully submitted that under such circumstances as existed in this case the debtor could not stand idly by because the facts in this dispute indicate that all parties were of the opinion that the proceedings before the Orphans' Court were all that were required and no approval of the Comptroller or order of court was necessary. Otherwise, surely the Comptroller and the Receiver would have promptly proceeded to obtain that approval and order of court when the assets were delivered to the Receiver. And when this approval and order of court were not obtained the debtor, to protect his own interests, should have prompted the Receiver to secure them as he is charged with knowledge that they were necessary.

If there was any neglect in this case it was not on the part of the shareholders of The Bank of Pittsburgh National Association whom the Petitioner in this case represents. It was only due to the neglect of the Receiver and the Comptroller of the Currency and, principally the Comptroller, since he is the supervising agent

responsible for the proper liquidation of the assets of the receivership. As stated by Judge O'Connell in his dissenting opinion, "If the receiver's estate has suffered under such circumstances, it may well be that some question of surcharge might be lodged against the Receiver but surely the district court would not penalize the innocent stockholder for the dereliction in duty of the receiver or Comptroller." Also, at the very inception of this matter, the Receiver and Comptroller had control over the 693 shares of the stock of The Bank of Pittsburgh and permitted it to be decreed back to the estate. Had this not been done Petitioner would not now be confronted with this claim. This is just another act over which the shareholders had no control and for which the Respondent, after more than thirteen years had passed, attempted to hold Petitioner responsible.

At the time this compromise was made and when the approval of the Comptroller and the order of court were had the shareholders legally were not in a position wherein it was possible for them to intervene. Nevertheless, according to the opinion of the learned United States Court of Appeals, as stated by Judge O'Connell in his dissenting opinion, the innocent shareholders are being penalized. The end of the last quotation from the opinion of the learned United States Court of Appeals, quoted at page 37 hereof, contains a sentence to the effect that it seemed to the court that the equitable result was that the increase in value should accrue to the Respondent in this case. Certainly, as just stated, where the shareholders are not at fault and could not have done anything about what the Receiver and Comptroller did or did not do, it is not equitable to charge these shareholders with any shortcomings of the Re-

ceiver and the Comptroller. And, also, during the period when this dispute arose, the Respondent was in a position to interpose the objections and claims which it is now presenting but it did not do so. This thought was expressed by Judge O'Connell in footnote 4 of his dissenting opinion in the following language:

> "The liquidation of the closed bank was conducted throughout upon the theory that the Harper estate had discharged its liability by an 85% payment in settlement. Why should a court now intervene and permit the Harper estate even to assert a value contrary to that which it has itself assigned over a period of years? Cf. the principles of collateral estoppel and law of the case."

The Receiver applied the profit made on the sale of the assets in payment of the debts of the receivership exactly the same as he applied profits from the sale of any other property. In this way all the creditors and, eventually, all the shareholders, including the Respondent, benefited. Under the theory of the majority opinion of the learned United States Court of Appeals only one shareholder, the Respondent, would benefit and more than 1100 would be penalized.

The majority opinion of the learned United States Court of Appeals says that "When the Trustee of that estate turned over its assets to the Receiver on May 16, 1932, it had done everything it could to pay the assessment. From that time the Receiver had full control of the securities and was entitled to collect the income on them. The question of interest arises now only because the Receiver delayed so long a time in obtaining the approval of the settlement. Under these circumstances,

we think there is no equitable basis for a claim of interest."

The question of interest in this case does not arise because the Receiver delayed such a long time in obtaining approval of the settlement. By virtue of the decision of *McCarty v. Gault,* 24 Fed. Supp. 977 (District Court, D. Oregon, October 3, 1938), interest is payable on all assessment debts until paid. The Respondent, under its theory, was charged with knowledge that the transfer of the assets to the Receiver was not effective until an order of court was secured. Until that transfer was effective it, therefore, knew that the securities could not have been sold to provide a fund to pay the debt. Also, when property is turned over in payment of a debt and the value of that property at the time it is so turned over falls short of the amount of the debt, as was true in this case, interest runs on the whole debt until paid. *West Republic Mining Co. v. Jones & Laughlin,* 108 Pa. 55, 69; *McCormack v. Sharples,* 254 Pa., 541, 542, 543, 99 A. 155.

If it is correct that from May 16, 1932, the date when it is said that the assets were turned over to the Receiver, the Receiver, "had full control of the securities and was entitled to collect the income on them," then it must follow that title to those assets was then vested in the Receiver. Otherwise, he would not have been entitled to collect the income. But, according to the theory of the Respondent, title did not vest until February 13, 1935, the date of the order of court. If the Receiver was, in fact, entitled to the income then, as stated, the title to these assets had already vested and

this without having obtained the approval of the Comptroller and an order of court, which indicates that the transfer of the assets must only have operated as a payment on account or must have been consummated by reason of the Comptroller's instructions to Receivers hereafter discussed, in either of which events no approval of the Comptroller or order of court was necessary.

In the majority opinion of the learned United States Court of Appeals it is decided that no interest whatsoever is due from the Respondent, notwithstanding the fact that payment of the debt could not have been made under the theory of the learned United States Court of Appeals until February 13, 1935. Consequently, the Respondent is placed in the same category as one who paid his entire assessment in cash when due on November 24, 1931, but if the Harper Estate had in fact done this, it would have been necessary for it to liquidate the securities at the then market value. Because Respondent says that title to the assets did not vest in the Petitioner until February 13, 1935, it follows that the Petitioner could not have sold these assets until then and therefore could not have realized funds with which to liquidate the debt until that time. What the Respondent is doing is claiming the benefit of the appreciation in value and at the same time denying liability for interest. This, it is most respectfully submitted, is inequitable. Especially is this true when these transactions were altogether beyond the control of the Petitioner and the shareholders whom it represents. Those who paid their assessments on a quarterly basis, beginning November 24, 1931, as was permitted, were even charged interest on the deferred payments. Yet here the learned United

States Court of Appeals, in its majority opinion, decided that a shareholder who does not pay his debt until February 13, 1935, should not be required to pay any interest.

The majority opinion of the learned United States Court of Appeals further says, in regard to interest, that "The question of interest arises now only because the Receiver delayed so long a time in obtaining approval of the settlement. Under these circumstances we think there is no equitable basis for a claim of interest." But again, the fact that those securities were not sold until February 13, 1935, was not the fault of the shareholders or the Petitioner. If interest is due it is respectfully submitted that the shareholders should not be penalized for the derelictions of the Receiver and the Comptroller.

Assessments amounting to more than $2,500,000 were paid in cash, in full and on time on more than 85% of all the stock of The Bank of Pittsburgh National Association. On account of the large amounts of money involved it is respectfully submitted that it is not inconceivable that many of these shareholders who paid their assessments on time and in cash would have found it necessary to liquidate certain of their assets so as to provide funds with which to pay these assessments. Under the decision of the learned United States Court of Appeals the payment of the assessment debt of the Respondent was allowed to be deferred until February 13, 1935. If the other shareholders would have been permitted to wait until that date, on account of the securities market having improved, they undoubtedly would also have made a profit which they were not permitted to realize.

If the Respondent should be permitted to have effect given to this compromise as of February 13, 1935, rather than as of the date of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, on May 24, 1932, it will realize a considerable advantage over the other shareholders which would be most inequitable. In the dissenting opinion of Judge O'Connell in this connection the following inquiry is made:

> "(a) Are the rights of stockholders, those who pay their assessments in full in cash promptly as well as those who settle their liability to the receiver by the innumerable varieties of compromise settlements, to depend upon the fortuitous circumstances of the conditions of the security market as of the date of a decree by the district court approving such compromise settlements? Why the date of the decree?"

If the opinion of the learned United States Court of Appeals is sustained the cost to each of the more than 1100 shareholders who paid their assessments in cash and on time would be in excess of 36¢ per share. In other words, a preference would be given to one shareholder who owned only 693 shares over a number in excess of 1100 representing 51,892 shares of a total of 60,000 shares.

IV.

The majority opinion of the learned United States Court of Appeals is contrary to "Instructions to National Bank Receivers" in accordance with which the assets in the possession of receivers of national banks have heretofore been administered.

In "Instructions to National Bank Receivers" (Office of Comptroller of the Currency, 1932) in c. IV, Schedules H-1, H-2 and H-3, pages 22 and 23, there is the following:

> "Losses incurred through collections from bankrupt estates and other estates which are settled and finally closed in accordance with usual legal process through the courts may be entered without the necessity of a court order or the permission of the department."

In the instant case, there was a collection made by the Receiver from a decedent's estate in accordance with the practice, rules and laws relating to the Orphans' Court of Allegheny County, Pennsylvania. Accordingly, this account "was settled and finally closed in accordance with usual legal process through the courts." Therefore, it is respectfully submitted that by virtue of this portion of the instructions of the office of the Comptroller of the Currency approval of the Comptroller and an order of court were unnecessary in this case and that title to the assets vested in the Receiver upon delivery. It may be that it was on account of this instruction that the Receiver and the office of the Comptroller of the Currency did not obtain an order of Court in 1932 when the assets were delivered to the Receiver. Under this instruction it would seem that it was unnecessary.

Another portion of said "Instructions to Receivers" in c. IV, pages 34 and 35, in regard to the method of bookkeeping, is as follows:

> "For example, if a receiver holds a bill receivable secured by collateral and finds it necessary to acquire title to such collateral by accepting it at an agreed valuation less than the face of the bill receivable, the price at which it is accepted is, of course, credited on the bill receivable, leaving a balance still due thereon. In such cases the assets in a receiver's hands are not increased and so no entry should be made in Schedule A."

It is respectfully submitted that if title to the assets involved did not vest in the Receiver when they were turned over to him by the Respondent then they must have been held by Petitioner as collateral for the payment of the debt and this is true even though it may be said in a sense, as the opinion of the District Court in this case stated, that they were held in trust. If they were held in trust they were held in trust for the payment of the assessment debt and subject to an "agreed valuation less than the face of the bill receivable" in which case, if the Receiver acquired title to the assets, credit, according to these instructions, would only be given for the agreed value which was exactly what was done in this case. Again, it may be that this was another reason why no approval of the Comptroller or order of court was obtained.

Also in said "Instructions to National Bank Receivers", c. VI, Section 5, pages 44 and 45, it is said:

> "When a debtor proposes to compromise his obligation to the bank the receiver should obtain the full-

> est information possible regarding his financial standing and ability to pay. If he is certain the debt cannot be collected in full the compromise proposition should be submitted to the Comptroller, with a full and complete statement of the debtor's resources and the receiver's recommendation as to whether the compromise should or should not be made. If the proposition is approved by the Comptroller and authorized by a court of competent jurisdiction, the compromise may be effected.

In this case, under the theory of the Respondent, the debtor proposed to compromise its obligation and it is respectfully submitted that it must be assumed that the Receiver conformed to these instructions and obtained the fullest information possible regarding the financial standing of the debtor. The Receiver must have concluded that the entire debt could not have been collected because he submitted the compromise proposition to the Comptroller for approval. Such approval was forthcoming and authorization by a court of competent jurisdiction was had. Thereupon, the Receiver possessed authority to effect the compromise, which he did. It is respectfully submitted that this concludes the proposition and that, as stated in the dissenting opinion of Judge O'Connell, the compromise may not now be attacked in a collateral proceeding.

V.

The majority opinion of the learned United States Court of Appeals entirely ignores the fact that under their opinion they were without jurisdiction.

On February 13, 1935, the date of the order of the District Court of the United States for the Western District of Pennsylvania, the values of the assets involved, together with interest and dividends collected by the Receiver, amounted to $42,783.35 (R. 50a, 51a, 52a) but the debt owed to the Receiver was only $35,654.35 (R. 2). Accordingly, there were more than sufficient funds on February 13, 1935, to pay the debt in full. There, therefore, could not possibly have been a compromise under those conditions but only a payment in full. If the majority opinion of the learned United States Court of Appeals is sustained holding that the values are to be taken as of the said date of February 13, 1935, then the Court is having the Comptroller approve a transaction as a compromise when there were more than sufficient funds to pay the debt in full. The Comptroller would never have done any such thing. He must, therefore, have approved the transaction as of the date when the assets were delivered to the Receiver, at which time the value of the assets was not sufficient to pay the debt and under which circumstances a compromise would naturally have been the method employed. Under the theory of the Respondent, if the compromise is to be effective as of February 13, 1935, then the value of the assets was more than sufficient to pay the debt in full and there could not have been a compromise. This being true, the court was then without jurisdiction as stated by Judge O'Connell in his dissenting opinion.

Only if the values as of the date of the decree of distribution are taken, as contended by Petitioner, could there be a compromise in this case and would the court have jurisdiction. Since the Respondent insists that there was a compromise, it is respectfully submitted that it cannot be heard to contend that the values should be taken as of the date of February 13, 1935, when any possibility of a compromise existing is precluded.

Respectfully submitted,

C. ROSCOE HOFFMAN,
RICHARD W. AHLERS,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 233

THE COLONIAL TRUST COMPANY, of Pittsburgh, Pa., Agent for the Shareholders of the Bank of Pittsburgh National Association, Petitioner,

v.

FIDELITY TRUST COMPANY, Trustee Under the Will of John A. Harper, Deceased, Respondent.

BRIEF FOR RESPONDENT

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THE COLONIAL TRUST COMPANY, of Pittsburgh, Pa., Agent for the Shareholders of the Bank of Pittsburgh National Association, Petitioner,

v.

FIDELITY TRUST COMPANY, Trustee Under the Will of John A. Harper, Deceased, Respondent.

BRIEF FOR RESPONDENT

STATEMENT

In the Petition and supporting Brief which have been filed in this case, Counsel for Petitioner treats the case, in his Statement of the matter involved, in his reasons relied on for the allowance of the Writ and in his Argument, as if it were a proceeding between the Respondent, a stockholder of The Bank of Pittsburgh, and the Receiver of that Bank. The case is argued as if it were an attempt on the part of a stockholder to recover back the funds involved in the case from the Receiver at the expense of unpaid depositors and creditors of the insolvent institution.

That is not the case.

It is of vital importance to a clear understanding of the issue involved in the case now before the Court that the proceedings are not between a stockholder of a defunct bank and the Receiver of that bank; that they do not involve a dispute concerning the collection of an assessment levied by the Comptroller of the Currency against a stockholder of the insolvent institution.

Instead, these proceedings constitute a dispute between the Respondent on the one hand, a stockholder who has contributed to a fund now in the hands of the Petitioner as Agent for *all of the stockholders*, and on the other hand, the Petitioner, concerning the distribution of that fund to those who created it. It is, in fact, a dispute between stockholders concerning the distribution of a fund created by them. In such a dispute it has been held that the National Banking Laws constitute the full authority and method for winding up National Banks. Nevertheless, when the creditors have been paid in full, and the fund in the hands of the Receiver has been turned over to an agent for distribution to the shareholders, the subsequent winding up by such shareholders' agent is subject to the equitable powers of the Court. *Spellmire v. Third National Bank of Pittsburgh,* 34 Fed. Supp. 77 (D.C. W. D. Pa. 1940).

The assessment levied by the Comptroller of the Currency against Respondent on November 21, 1931, on account of its ownership of 693 shares of the stock of The Bank of Pittsburgh National Association was $34,650.00 plus interest in the sum of $1,004.85. On that date the assets of the Respondent had a market value of $32,759.12. These securities less a 2% commission to the trustee were distributed by the Orphans' Court of Allegheny County to the Receiver in full settlement

of Respondent's stockholder's liability on the 16th day of May, 1932.

It was not until January 7th, 1935, that the Comptroller of the Currency authorized the Receiver to accept this settlement, and it was not until February 13th, 1935 that the Receiver presented his petition to the District Court of The United States for the Western District of Pennsylvania and obtained authority from that Court to accept those assets from the Respondent. On the day of the District Court's Order the securities had enhanced in value so that they were worth $42,783.35.

Accordingly when the Petitioner, who was acting as agent for the shareholders of the bank received the fund from the Receiver for distribution among the shareholders in accordance with the provision of Section 197 of Title 12 U.S.C.A. that fund was made up in part by the actual realization of $42,783.34, from the assets turned over to the Receiver of the bank by the Respondent in 1932.

Petitioner as agent for all of the shareholders, refused to make any distribution to Respondent as the owner of 693 shares, and suit was entered to recover Respondent's distributive share of the fund in the hands of the Petitioner for distribution in the sum of $8,189.76, together with the difference between the amount which the Petitioner realized on account of the sale of the assets obtained from Respondent and the assessment liability of the Respondent (R. 5a, 26a).

The complaint in this case was filed upon the equitable principle that a shareholder whose assets were paid into a fund which is now to be repaid to the shareholders under Section 2 of the Act of June 30, 1876, c. 156, sec. 3, 19 Stat. 63, as amended (12 U.S.C.A. sec.

197) should be entitled to participate in that fund in direct proportion to the amount that the fund was enriched by the assets paid in by the shareholder. Section *Second* of the Act requires the shareholders' agent:

> "To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States."

Notwithstanding the market value of the assets on the day that they were turned over to the Receiver for the bank, it was an actual fact that the Receiver in liquidating the assets some three years after their receipt obtained $42,783.35 which was $7,128.50 more than Respondent's assessment, with interest to the date upon which the securities were turned over to the Receiver. Nevertheless shareholders' agent claimed the right, in making distribution of this fund, to credit Respondent with only $30,159.58, the market value of the securities on the day they were turned over to the Receiver. The shareholders' agent did not receive from the Receiver $30,159.58; he received $42,783.35, and it was this latter amount which he was distributing to the shareholders.

Suit was entered by the Respondent upon the theory that the stockholders' assessments created a fund. This fund was more than sufficient to pay the expenses and claims of the bank and was in the hands of the stockholders' agent for distribution by that agent among the stockholders who created the fund. The stockholders' agent is required, by statute, to "repay any amount or amounts which have been paid in by any shareholder

or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association." The amount paid into the fund which the agent had, and which was turned over to him by the Receiver of the bank, was $42,783.35. In other words, there was in this fund $7,128.50 more than the full amount of Respondent's assessment, with interest to May 16, 1932.

Petitioner filed a motion to dismiss the complaint as amended, (R. 28a), which motion was denied by the District Court of the United States for the Western District of Pennsylvania on February 23, 1948 (R. 45a). An answer was filed by Petitioner (R. 48a), and Respondent filed a motion under Rule 12 (C) of the Federal Rules of Procedure for judgment on the pleadings (R. 53a). After argument upon said motion, the District Court entered judgment in favor of the Respondent and against the Petitioner (R. 59a). An appeal was taken by Petitioner to the United States Court of Appeals for the Third Circuit which Court, after argument before Judges Goodrich, McLaughlin and O'Connell on November 19, 1948, and reargument before the entire Court on March 21, 1949, affirmed the judgment of the District Court (R. 90), Judge O'Connell dissenting.

The case is now before this Court upon Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

SUMMARY OF ARGUMENT

I. A stockholder in an insolvent bank is entitled to recover from the agent for all of the stockholders to the extent that the stockholder contributes, directly or indirectly, to the fund being distributed by the agent among the stockholders who created it. The stockholder will be considered to have paid his assessment to the extent of his contribution to the fund even though the actual determination of the amount of his contribution cannot be made until a subsequent time.

II. The Receiver had no authority to sell the securities until he had been authorized to do so by the Comptroller of the Currency and upon order of a Court of record of competent jurisdiction. Since the Receiver did not secure that authority and the permission of the Court until February 13th, 1935, the stocks, bonds, and mortgages should be valued as of that date in determining the amount to be repaid the stockholders by the agent for the stockholders, inasmuch as the agent actually has in cash for distribution the amount which he received from the Receiver, who sold the securities at the values they had on the day the Court authorized him to do so.

III. The decision of the United States Court of Appeals for the Third Circuit follows the instructions of the Comptroller of the Currency to National Bank Receivers.

ARGUMENT

I.

Counsel for both parties are in full agreement that the fund must be distributed by the Petitioner, as stockholders' agent, in accordance with the Act of Congress, approved June 30, 1876, c. 156 sec. 3, 19 Stat. 63, as amended, (12 U.S.C.A. sec. 197) which provides *inter alia* that a shareholders' agent, winding up the business of a national banking association, shall distribute the proceeds of the assets or property of the association as follows:

> "First. To pay the expenses of the execution of the trust to the date of such payment;
>
> "Second. To repay any amount or amounts which have been paid in by any shareholder or shareholders of such association upon and by reason of any and all assessments made upon the stock of such association by the order of the Comptroller of the Currency in accordance with the provisions of the statutes of the United States; and
>
> "Third. The balance ratably among such stockholders, in proportion to the number of shares held and owned by each. Such distribution shall be made from time to time as the proceeds shall be received and as shall be deemed advisable by the said Comptroller or said agent."

The only controversy between counsel exists in the application of this statute.

The statute has been construed by the Circuit Court of Appeals for the Seventh Circuit in *In Re First Na-*

tional Bank of Arthur, Ill., 100 F. 2d 623 (1938). In that case the Court held that a stockholder who had made a one hundred percent payment on his assessment should, to the extent that his percentage exceeded the percentage of his fellow stockholders, be first repaid. The Court said at Page 624:

> "* * * in the absence of a statute requiring a different distribution, it would seem just and equitable that the stockholder who made a one hundred percent payment on his assessment should, to the extent that his percentage exceeded the percentage of his fellow stockholders, be first repaid. Without such full payment by him there would be no fund to distribute."

It is obvious that under the decision in this case the determination of the shareholder's percentage of payment on account of his assessment liability is the important factor. If the payment is in cash, there is no trouble in ascertaining that percentage. But where, in cases like the one at bar, the shareholder pays the assessment, not in cash, but in stocks, bonds and mortgages, which are listed at their market value when they are transferred to the Receiver, but which, when sold, bring more or less than the shareholder's assessment liability, these questions are raised:

(a) What is the shareholder's percentage of contribution when the assets realize less than the assessment liability?

(b) What is the shareholder's percentage of contribution when the assets realize more than the assessment liability?

And the further question to be answered in the latter situation is—

(c) What is to be done with the excess amount realized over the assessment liability?

The District Court of the United States for the Eastern District of Illinois has been faced with this situation. In *First National Bank of Hoopeston, Illinois,* 23 Fed. Supp. 436 (1938), the shareholder turned over real estate which had cost the shareholder approximately $20,000.00, in full settlement of his liability to the bank. Subsequently, the Receiver sold this real estate for $5,600.00 with Court approval. The Court held, in advising the shareholder's agent how the fund should be distributed, that since the shareholder's contribution to the fund was in fact only $5,600.00, distribution must be made on that basis.

It is respectfully submitted that the decision in that case is correct and that by applying the law of that case to the converse situation in the case at bar, the determining factor is *the stockholder's contribution to the fund,* which, in our case, was $7,128.50 in excess of the assessment. If the securities in the case at bar had been sold by the Receiver for only $5,600.00, then Respondent's contribution to the fund would have been *less* than the assessment, and he would be entitled to participate in the fund only to the extent that the agent was in funds from the sale of his assets. If this is true, is it not equally true that where the securities bring *more* than the assessment, the stockholder should be credited with the profit?

It should be noticed that in the Hoppeston case, as in this, the settlement was a settlement in kind; a delivery of property in satisfaction of a fixed indebtedness.

The situation in the Hoopeston case sustains the theory that *to the extent that the stockholder contributes to the general fund, directly or indirectly, to that extent will he be considered to have paid his assessment even though an actual determination of the amount of his contribution cannot be made until a subsequent time.*

Therefore, as among stockholders (which is all we are interested in) a profit made in the disposition of property transferred by a stockholder in satisfaction of his indebtedness should be held as part of a fund in which the stockholder may participate; and not as part of a fund from which he will be excluded. Were it not for the profit from his contributed securities, the fund to be distributed would certainly not have been as great or as large as it is.

Suppose, for example, the fund were large enough to pay all the stockholders the amount of their assessments in full and there was still a balance of $7,128.50 in the fund. Would it not be more equitable to return this to the Respondent stockholder whose securities created it, rather than to divide it among all of the stockholders to the exclusion of the Respondent?

The theory upon which the Respondent is proceeding in the case at bar is not that an assessment liability is considered to be paid in full merely because of the use of the words "in full satisfaction of the claim," or "in full settlement of," or words of like import, in the compromise or settlement of a shareholder's assessment liability. On the contrary, Respondent contends that where assets transferred to a Receiver increase in value to more than the original assessment liability, plus

interest, the Receiver's account and the contributing shareholders have benefited to such an extent that the contributing shareholder is considered to have paid his assessment in full and is entitled to one hundred percent in the distribution of the fund, as well as to the return of the profit.

Who is entitled to the excess of the amount realized on the sale of these assets over and above the shareholder's liability?

The whole purpose of the Receiver, in making his assessment on the holder of national bank stock, is to create a fund to be used in satisfying the claims of creditors and depositors. It is only after these claims have been paid in full, with accumulated interest, that the contributing shareholders are entitled to repayment. The equities arising relate only to the rights of the contributors themselves. The cases have decided that payments should first be made to those shareholders whose percentages of payment of their assessment exceed the payment made by other contributing shareholders in the amount of such excess. See *In Re First National Bank of Arthur, Ill., supra; Russell v Levi,* 286 Ky. 51, 149 S. W. 2d. 734 (1941).

The important consideration, where there has been a compromise and settlement of a shareholder's liability, is the actual cash received on the sale of the assets and not their market value at the time of the transfer to the Receiver. In the present case, the Fidelity Trust Company, Trustee under the Will of John A. Harper, turned over assets, pursuant to an Orphns' Court Decree, having a market value of $30,159.58 as of May 13, 1932,

in compromise and settlement of a principal liability of $34,650.00, plus interest of $1,004.85, or a total liability of $35,654.85.

Since the interest, charged against an assessment liability, is in the nature of a penalty to insure prompt payment, once the liability is paid in full, whether in cash or by the transfer of assets which are liquidated to the amount of that liability, then interest should cease. Therefore, in the present case, the Respondent's liability was $35,654.85. As the Receiver of the bank stands to realize more than this amount on the sale of the assets, the Respondent has made more than a one hundred percent contribution. As of August, 1946, the sale of the assets of the John A. Harper Estate had brought in $42,783.35. Accordingly, the Respondent has contributed to the shareholders' fund a total of $7,128.50 more than its assessment, plus interest to May 16, 1932. This is approximately a 119.9 percent. contribution.

Counsel has not contended that the Respondent would be entitled to the excess or profit made upon the sale of its securities as against the creditors or depositors but only as against the other contributing shareholders. Any other conclusion would result in the Respondent's excess contribution being distributed to other shareholders and would give them a greater percentage of credit on their original assessment than they had made. This would obviously be an inequitable result.

Again to illustrate: Suppose, after paying all of the claims of creditors and depositors, together with accumulated interest and the expenses of receivership,

there were sufficient funds to repay the contributing shareholders in full and have the amount of the Respondent's excess contribution left over. To divide this excess among all contributing shareholders would confer a benefit upon them which they do not deserve and work a detriment to the Respondent which it should not suffer. Such result would be inequitable. Yet, if the Respondent in the present case is considered, as counsel for the Petitioner contends, to have made only an eighty-five percent. payment of its assessment liability (which eighty-five percent payment is based upon the market value of the assets turned over to the Receiver on the date of their delivery and not on the day when the settlement was approved by the District Court or on the day they were sold), then the increase in the value of the assets would inure to the benefit of the other contributing shareholders at the Respondent's expense. This result should not be permitted by any court of equity.

II.

Counsel for Respondent argued the case before the Court below upon two theories: *First,* that the Respondent stockholder was entitled to participate in the fund in proportion to which its assets contributed to that fund, as set forth in Argument I; and *second,* that the Receiver had no authority to sell the securities until he had been authorized to do so by the Comptroller of the Currency and upon order of a court of record of competent jurisdiction; and that since he had not secured that authority and the permission of the court until February 13, 1935, the stocks, bonds, mortgages and cash should be valued as of that day. Since their value on

that day was $42,783.35, (which was $7,128.50 in excess of Respondent's liability, with interest to the day the securities were turned over to the Receiver), Respondent should be entitled to recover not only the distributions already made, and to which it would be entitled on the basis that it had paid its assessment in full, but also the excess amount between the value of the securities on the day the Receiver was authorized by the District Court to accept them in compromise and settlement, and the amount of the stockholder's liability, which was $7,128.50.

The lower Court, in deciding the case, adopted Respondent's second theory. Counsel for Petitioner, in his Petition wholly ignores Respondent's first theory and urges this Court to grant a writ of certiorari because he contends that the Court was in error in stating that the approval of the Comptroller of the Currency and of a court of record was necessary for the sale of the securities by the Receiver.

Counsel for Petitioner argues that approval of a court of record is necessary only in the case of a compromise; that to accept the stocks, bonds, mortgages and cash which the Respondent offered "in full settlement" of its stockholder's liability was not a "compromise"; and that, therefore, no Court approval was necessary. Hence he contends that title to the stocks, bonds, mortgages and cash passed to the Receiver on May 16, 1932 and with that the matter ended. In such case, he submits, all the Respondent is entitled to, is to be credited with the market value of the securities on the date of their delivery.

It is respectfully submitted that the authority of a Receiver to deal with a stockholder with reference to his assessment arises out of the Act of Congress of February 25, 1930, c. 58, 46 Stat. 74 (12 U.S.C.A. Sec. 67) which reads as follows:

> "Any receiver of a national banking association is authorized, with the approval of the Comptroller of the Currency and upon the order of a court of record of competent jurisdiction, to compromise, either before or after judgment, the individual liability of any shareholder of such association."

It is submitted that when the Congress used the words "to compromise, *either before or after judgment,*" it meant to do exactly what the Receiver did in the case at bar. To accept property with a market value of less than the amount of a fixed assessment in full settlement of that assessment is a greater power than the power to compromise a disputed claim. Certainly the Congress did not intend that a Receiver should have the power to *settle* a stockholder's liability for an amount less than the assessment, without the approval of the Comptroller of the Currency and without an order of a court of record of competent jurisdiction, but did intend that the Receiver must have the approval of the Comptroller and an order of court to *compromise* a disputed claim. In other words, when Congress used the words "to compromise either before or *after judgment*" it meant to use the word "compromise" in a broad sense to include the "settlement" of liquidated claims as well as the "compromise" of doubtful claims, since a shareholder's liability is certainly liquidated when it has been reduced to judgment.

Settlement is sometimes used as synonymous with compromise (11 Am. Jur. sec. 2, Page 247) and it is

certainly in this sense that Congress used the word compromise in the statute above referred to.

In *Goess v. A. D. H. Holding Corporation, et al,* 85 F. (2d) 72, (1936) it was contended by the defendant that since the plaintiff, who was the Receiver of an insolvent national bank, had compromised the assessment liability of some shareholders for less than $100.00 per share, the defendant's liability must be limited to the percentage of the lowest of such compromises. The decision has no bearing upon the case at bar except that it shows that the Court regards the words "to compromise the individual liability of any shareholder" as meaning the settlement of a claim for something less than its full amount. The Court said at Page 73:

> "But even if, as may be assumed, the law still requires the assessment to be spread equally and ratably upon all shareholers, there is express statutory authority for the receiver, with the approval of the Comptroller of the Currency and upon court order, *to compromise the individual liability of any shareholder.*" (Italics supplied)

An examination of the Record (Page 21a) shows that on December 28, 1934, the Receiver wrote a letter of recommendation to the Comptroller of the Currency; that a letter of approval was received January 7, 1935; and an Order of Court obtained on February 13, 1935. None of these memoranda are printed in the Record. It is interesting to note, however, that the Petition of the Receiver, filed in the District Court of the United States for the Western District of Pennsylvania at No. 2589 in Equity, states that it is a "Petition for Leave to Compromise and Settle Assets." The Order of Court at the same number and term, dated February 13, 1935,

is likewise entitled "Order for Leave to Compromise and Settle Assets."

Attached to the Receiver's Petition, at No. 2589 in Equity, in the District Court of the United States for the Western District of Pennsylvania, as Exhibit D, is the Comptroller's letter of authority, dated January 7, 1935. This letter reads in part, "You are authorized to petition the Court for an Order permitting you to accept the securities delivered to your trust in settlement of your bank's claim in full settlement of the stock assessment liability of the J. A. Harper Estate in the amount of $34,650.00."

Certainly this Court can come to no other conclusion than that reached by the lower court, namely, that it was necessary for the Receiver of the Bank of Pittsburgh to obtain the permission of the Comptroller of the Currency, and an Order of the District Court of the United States for the Western District of Pennsylvania, to enter into the arrangement which it did with the Trustee of the Estate of John A. Harper, Deceased. To reach any other conclusion would be to open the door to opportunities for fraud not intended by the Congress of the United States.

III.

Section 5 of Chapter VI of the "Instructions to National Bank Receivers," issued by the Comptroller of the Currency, reads as follows:

> "Only bad or doubtful debts may be compromised and even in those instances the approval of the comptroller and the authority of an order of a court of record of competent jurisdiction are *first necessary*.

> "In many instances debtors of your trust will come in before the maturity of their obligation and offer to pay the face of their debts with interest to that day, provided the remainder of interest is rebated to them. Unless the obligation reads 'payable on or before' or is payable on demand such a rebate could not be allowed except as a compromise. In that case the obligation would have to be a bad or doubtful debt and the consent of the comptroller and the authority of a court order *first obtained* before the allowance of the rebate." (Italics supplied)

Again the Comptroller states: "If the proposition is approved by the Comptroller and authorized by a court of competent jurisdiction, the compromise *may be effected.*" (Italics supplied)

Certainly the Comptroller, in his Instructions to National Bank Receivers, has no doubt that there is not an effective compromise until he has approved it and an order of a court of competent jurisdiction obtained authorizing it. It is inconceivable that the Comptroller should be considered bound by the terms of the compromise before the conditions precedent have been met and it is unconscionable that the order of a court of competent jurisdiction should have the effect of retroactively binding the other party to the compromise at a time when the Comptroller himself is not bound.

It is well established that the construction of a statute by those charged with its execution, particularly high executive officers, is entitled to great weight and consideration. At Key Number 219, entitled "Executive Construction," of Volume 59 Federal Digest, at Page 533,

there are twenty-six columns of cases listed supporting this principle of law. Certainly the directions of the Comptroller of the Currency to National Bank Receivers specifically stating that before a compromise may be made, the Receiver must obtain the approval of the Comptroller and the authority of an order of a court of record of competent jurisdiction must be given great weight and consideration by the Court in determining the day upon which the compromise between the representatives of the Harper Estate and the Receiver became effective. And under his instructions it could not have been effective until the conditions precedent had been performed. That date was February 13th, 1935. This was the conclusion reached by the Court of Appeals for the Third Circuit.

Conclusion

It is respectfully submitted that the Petition is without sound basis, and should be denied.

MAHLON E. LEWIS,
Attorney for Respondent.

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IN THE

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OCTOBER TERM, 1949.

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FIDELITY TRUST COMPANY, Trustee Under the Will of John A. Harper, Deceased, Respondent,

v.

THE COLONIAL TRUST COMPANY of Pittsburgh, Pa., Agent for the Shareholders of The Bank of Pittsburgh National Association, Petitioner.

REPLY BRIEF OF PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. 233.

FIDELITY TRUST COMPANY, Trustee Under the Will of John A. Harper, Deceased, Respondent,

v.

THE COLONIAL TRUST COMPANY of Pittsburgh, Pa., Agent for the Shareholders of The Bank of Pittsburgh National Association, Petitioner.

REPLY BRIEF OF PETITIONER.

In the Brief for Respondent the statement is made that the supporting brief of the Petitioner treats this case as if it were a proceeding between a stockholder and the receiver of a national bank. Petitioner is not aware of any such treatment. It has, however, insisted that the rights of Respondent were fixed and determined by the conduct of the parties and the proceedings in the courts during the term of the receivership.

The fund of which Respondent speaks as having been made up of contributions was the result of payments made by all the shareholders who paid assessments and not just the Respondent. Since all of them

contributed they were all entitled to participate in all of the contributions. When a shareholder pays his assessment that assessment becomes a part of one general fund for the payment of debts. After all the debts of the trust are paid each shareholder is entitled to participate in the balance of the fund in proportion to the amount which it contributed. *In re First National Bank of Arthur, Illinois,* 100 F. 2d 623 (1938.)

Under the law of the Commonwealth of Pennsylvania, payment of debts may be made by the delivery of property. *Hamilton v. Moore* 4 W. & S. 570 (Pa.); *Richabaugh v. Dugan,* 7 Barr 394 (Pa.); *Heath v. Page,* 48 Pa. 130 at 143, and where the parties, at the time of the delivery of the assets, fix a value to the property transferred, the delivery of that property, in law, is equivalent to the payment of that much money. Volume 1, *Cyclopedia Law and Procedure,* 335; *Griffith v. Creighton,* 81 Mo. App. 1; Volume 1 *American and English Encyclopedia of Law,* Second Edition 418; *Howard et al. v. Norton,* 65 Barb (N. Y.) 161. Accordingly, the only payment made by the Respondent was the value of the assets at the time of the delivery, which was agreed upon as $30,159.58, and was in pursuance of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania. It is true that the Receiver held these assets and eventually realized $42,783.35 but that is of no significance. The principal involved in this case is the same as in a situation where a debtor transfers property at an admitted value of $5000 to a creditor to apply on an indebtedness. The title to the property would vest in the creditor immediately and the account of the debtor would be credited with $5000. Under these circumstances, if the property, before it is sold by the creditor, increases in

value, the creditor would, of course, be entitled to the amount of the appreciation, and not the debtor. That is exactly the situation in this case. Of course, as stated by Judge Gibson in his opinion in the District Court, the controlling question is when title to the assets vested in the Petitioner. It is respectfully submitted that not only is this question involved but, more important still, the question is, on what basis the title vested. In other words, what was the consideration of the transfer and what should be the amount of credit to which the Respondent was entitled?

As set forth in the brief supporting the petition in this case, the parties, between themselves, agreed as to the value of the assets turned over to the Receiver. Furthermore, in the Decree of Distribution in the Orphans' Court of Allegheny County, Pennsylvania (see pp. 19 et seq. of said brief), which decree was necessary before Receiver was entitled to these assets, a detailed list thereof was set forth with the respective values of each asset. In other words, this decree described the assets in detail and placed a value upon them and the parties, unless exceptions were filed, which was not done, were bound by these values. Section 2 of the Orphans' Court Act of the Commonwealth of Pennsylvania of June 7, 1917, P. L. 363 (Purdons Pennsylvania Statutes, Title 20 Section 2085) is as follows:

> "The orphans' court of each county, whether separate or otherwise, is hereby declared to be a court of record, with all the qualities and incidents of a court of record at common law. Its proceedings and decrees in all matters within its jurisdiction shall not be reversed or avoided collaterally in any other court; but they shall be liable to reversal, modification or alteration on appeal."

Here, then, was a Court of competent jurisdiction making a decree in a case in which the Respondent was a party and in which values were given to the assets. The law permitted it ten days within which to file exceptions but it did not do so and, accordingly, the decree became final. Thereupon, by reason of the said quoted Section 2 of the Act of 1917 of the Commonwealth of Pennsylvania, that decree may only be reversed, modified or altered upon appeal to the appropriate appellate court. It may not be attacked in a collateral proceeding such as has been attempted in this case.

It is respectfully submitted that title to the assets vested upon delivery on July 8, 1932 (R. 20a), or on February 13, 1935, the date of the decree of the District Court of the United States for the Western District of Pennsylvania, on the terms agreed upon and also fixed in the said mentioned Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania.

Respondent claims that it should receive credit for the proceeds realized from the sale of these assets and in support of its position cites the case of *First National Bank of Hoopeston, Illinois,* 23 Fed. Supp. 436 (1938). In that case real estate was turned over to a receiver of a national bank and nothing whatsoever was said about the value of the property at the time of transfer. A portion of the opinion in that case is as follows:

> "The Comptroller authorized the acceptance of this offer and the Court approved the action and authorized the receiver to accept in full of all said liabilities, the said real estate. This property, according to the testimony, originally *cost the* Merritts in

the neighborhood of $20,000.00 *The Receiver sold it September 28, 1937 under authority of the Comptroller of the Currency, duly approved by this Court, for $5,600.00. Nothing else appears in the evidence as to the value of the property."* (Emphasis supplied.)

As stated in the above quotation, nothing whatsoever appears as to the value of the property when it was turned over to the receiver. This is altogether different from the case here under consideration where the parties themselves agreed to the values and, in fact, the assets were decreed to the Petitioner at certain fixed stated prices. In the *Hoopeston* case the only evidence of value was the amount at which it was sold and that amount, therefore, was taken as the value of the property involved. In this case now before this Court, if no value had been placed upon the assets when they were turned over to the Receiver, then it is admitted that the argument of the Petitioner would not be tenable. The authorities sustain the position that where property is transferred in payment of a liquidated debt, and a value is placed upon that property at the time of transfer, payment results only to the extent of such value.

In the liquidation of a national bank a receiver, when he accepts assets other than money in payment of a debt, does not wait until he sells those assets to determine the amount of credit to be given the debtor. The amount eventually received does not determine the amount of credit but rather the value of the asset at the time it is turned over to the receiver. The authority for this practice is set forth on pages 46 and 47 of the brief in support of the petition in this case, whereat

portions of "Instructions to National Bank Receivers" are quoted.

Respondent speaks of the profit made in the disposition of property transferred by a shareholder in satisfaction of his indebtedness as a fund in which the stockholder should participate. Petitioner agrees with this. In fact, Respondent is participating in the profit realized from the sale of the assets which it transferred to the Receiver. The extent of its participation is governed by the amount of its payment into the fund, which was the value of the assets when they were turned over to the Receiver. That payment only represented 85% of the assessment debt and Respondent has been paid on that basis. All other shareholders have been treated in the same way. They have participated in the total fund to the extent of their payment on account of their assessment. The determining factor in this case is the value of the assets when they were turned over to the Receiver and not the proceeds from the sale of those assets. Respondent states that "were it not for the profit from his contributed securities, the fund to be distributed would certainly not have been as great or as large as it is." This is true but it is likewise true in the case of every other shareholder who turned over property, rather than money, which increased in value before it was sold.

During the early 30s, when this transaction took place, many debtors were unable to pay their debts in cash and, instead, transferred to the Receiver property in payment of their obligations. Since most property increased in value over and above its worth when it was received during that period, if the contention of Respondent prevails, it will be necessary to review each and

every one of these transactions in every receivership of a national bank.

Respondent contends that it is not asking that its position be sustained because of the language used in the Orphans' Court proceedings in regard to settlement and satisfaction. On the contrary, it argues "that where assets transferred to a receiver increase in value to more than the original assessment liability, plus interest, the receiver's account and the contributing shareholders have benefited to such an extent that the contributing shareholder is considered to have paid his assessment in full and is entitled to 100% in the distribution of the fund as well as to the return of the profits." As a practical matter, where title to property other than money vested in the Receiver it was considered as a common fund and separate accounts were not kept for each debtor. This has always been the practice of receivers of national banks. When a receiver has property transferred to him he holds it, first, for the benefit of the creditors and then for an agent to be selected by the shareholders. The receiver does not hold that property only for the shareholder who has turned it over to him. In this case the Respondent paid only to the extent of the value of the assets when they were turned over to the Receiver. That value was agreed to by the parties and fixed in the Decree of Distribution in the Orphans' Court of Allegheny County, Pennsylvania, and that decree may not be collaterally attacked as is being done in this case.

In its brief Respondent states that "the important consideration, where there has been a compromise and settlement of a shareholder's liability, is the actual cash received on the sale of the assets and not their market value at the time of the transfer to the Receiver." It is

respectfully submitted that there is no law to support this position and, in fact, Respondent cites no authority for its contention in this respect and, as Judge O'Connell, in his dissenting opinion, says:

> "It is not inapposite to note that, had the Harper Estate and the Receiver not intended such values to be binding upon all interested parties, the trustees of the estate could and should have liquidated the assets so as to have a fund to apply on account of the debt due the Receiver."

In this same connection, Judge Gibson, in his opinion in the District Court, in this case in part said:

> "If the Receiver then had the right to make an agreement by which he released the Harper Estate from liability on an undisputed debt of $34,650.00 upon delivery to him of securities of an admitted net value of but $30,159.58, common sense leads to the proposition that he took title to the securities delivered to him and could handle them as he desired. He took over all the assets of the Harper Estate and that estate lost all title to those assets. If the securities decreased in value he had no remedy, but if the reverse occurred he was the beneficiary, not the Harper Estate. To hold otherwise would be to adopt a 'heads-I-win-tails-you-lose' policy on behalf of the Estate."

It is respectfully submitted that for a receiver to operate under the theory of the Respondent in this case would result in a ridiculous situation. In every case where a receiver took assets other than money in payment of a debt, if the Respondent is correct, as soon as those assets reached a value equal to the debt the receiver or agent would then promptly sell them so that, in

no event, would the debtor or the shareholder ever receive any appreciation in value over and above the amount of the debt. In the instant case, if the theory of the Respondent is correct, surely no one can imagine the Receiver or the Agent retaining the assets after they reached a value equivalent to the debt and interest. As stated, the result of this would be that neither the creditors nor the shareholders would ever be in a position to possibly participate in any appreciation in value in excess of the debt and interest.

Respondent repeatedly speaks of having contributed to the fund the sum of $42,783.35, whereas the fact is he only contributed to the fund the value of the assets at the time they were transferred to the Receiver, which value was $30,159.58. As heretofore stated, when property at a fixed value is turned over in payment of a debt the transaction results in payment of only that amount of money. In this case when the property was receipted for by the Receiver in pursuance of the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, and in accordance with the values therein set forth and agreed to by the parties in the Certificate of Settlement or Sale (R. 20a), the status of the Respondent was finally and definitely fixed insofar as its participation in the fund administered by the Agent was concerned. That transaction resulted in a payment of 85% of the assessment and the Respondent has been paid on that basis.

Respondent argued that any other conclusion than his own would result in the Respondent's excess contribution having been distributed to other shareholders and would give them a greater percentage of credit on their original assessment than they had made. It is

respectfully submitted that Respondent has failed to take into consideration that it likewise participates in the appreciation in the value of property transferred to the Receiver by other debtors; not only shareholders but other debtors during the receivership. In other words, if this theory evolved by Respondent applies to shareholders in cases of compromises it would certainly also apply to debtors during all receiverships; for instance, where a debtor was obligated by reason of his liability on a note and was without cash but transferred property to the Receiver on account of his liability. If the Respondent is correct, and the value of the property increased beyond the liability on the note, it would be necessary for the Receiver to refund that excess to the debtor. This was not done and thousands of accounts would come within this category so that it would be necessary to review all of them.

Counsel for Respondent has argued this case upon two theories, first, that the Respondent was entitled to participate in the fund in proportion to which the proceeds from the sale of its assets contributed to that fund and, second, that the Receiver had no authority to sell the securities until he was authorized to do so by the Comptroller of the Currency and upon an order of court.

As heretofore explained, the contribution of the Respondent to the fund was the value of the assets set forth in the Decree of Distribution of the Orphans' Court of Allegheny County, Pennsylvania, and that agreed to by the parties at the time of their delivery to the Receiver. The question of the participation of the Respondent on this basis is heretofore discussed. As to the second contention of the Respondent, it is respectfully submitted that whether or not the Receiver had any authority to sell the assets was immaterial.

The question is, whether or not title to the assets was vested in the Receiver and on what terms. It is admitted that a Receiver never has any authority to sell any asset without the approval of the Comptroller of the Currency and upon an order of court. However, this has nothing whatsoever to do in determining who is entitled to the proceeds of the sale. That is altogether dependent upon whether or not title vested in the Receiver. If title to the assets vested in the Receiver upon delivery in 1932, the fact that authority to sell them was not obtained until 1935 was immaterial. The right to sell certainly has nothing to do with the fixing of the values.

Respondent insists that counsel for Petitioner always ignores the Respondent's first theory, that Respondent is entitled to participate in the fund in the proportion to which the proceeds from the sale of the assets contributed to that fund. As this theory is understood by Petitioner, that statement is correct. However, it is respectfully submitted that the District Court and the United States Court of Appeals also ignored this theory. It is contended by Respondent that counsel for Petitioner urges that this Court grant a Writ of Certiorari because the lower Court "was in error in stating that the approval of the Comptroller of the Currency and an order of court were necessary for the sale of the securities by the Receiver." Counsel for Petitioner is not aware of ever having presented this argument. It is admitted by Petitioner that it is necessary for the Comptroller of the Currency and a court of record to approve and direct a sale before a sale of any asset of a receivership may be made.

In the brief of Respondent, in regard to interest, there appears the following:

"Since the interest, charged against an assessment liability, is in the nature of a penalty to insure prompt payment, once the liability is paid in full, whether in cash or by the transfer of assets which are liquidated to the amount of that liability, then interest should cease."

From this quotation, it will be noted that Respondent admits that "once the liability is paid in full" then interest should cease but under the theory of Respondent this liability could not have been paid in full until February 13, 1935 because Petitioner had no authority to sell the assets until that time. Therefore, Respondent should be charged with interest on the assessment debt to said date of February 13, 1935. Of course, Petitioner contends that title to the securities vested in the Receiver upon delivery in 1932 when credit was given Respondent for their value of $30,159.58 and thereafter interest accrued only on the balance of the assessment debt.

The Act of February 25, 1930 (Title 12 U. S. C. A. #67)[1] only requires approval of the Comptroller of the Currency and an order of court if there is a compromise. If there was not a compromise but only a payment on account title to the assets vested in the Receiver upon delivery without any further action.

In connection with the delivery of the assets it was stated that this was done "in full settlement" and "in full satisfaction." Also, the petition to the District Court was called a "Petition for Leave to Compromise

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[1] See Note 1, page 5 of Brief in Support of Petition for Writ of Certiorari.

and Settle Assets" and the letter from the Comptroller of the Currency in regard to that petition states that "you are authorized to petition a Court for an order permitting you to accept the securities delivered to your trust in settlement of your Bank's claim in full settlement of the stock assessment liability of the John A. Harper Estate in the amount of $34,650."

Now, just suppose all these phrases were applied to a transaction where A owed B $100 and paid him $50. In other words, when the payment of $50 was made it was stated that it was "in full settlement" and "in full satisfaction" of the debt of $100. Furthermore, let it be assumed that the creditor was a national bank receiver and that he presented a petition "for leave to Compromise and Settle Assets" and that the Comptroller authorized the Receiver to present his petition to court by the use of the pertinent language above quoted. These expressions constitute the only basis for the contention that there was a compromise in this case but, surely, they would not make a transaction a compromise where $50 was paid to a creditor when $100 was admittedly due. Such a transaction is nothing but a payment on account and just because a payment on account is called a compromise does not make it a compromise. Yet that is exactly the situation in this case. Here the debt was $34,650 and securities of "an admitted net value of but $30,159.58," as stated by Judge Gibson, were delivered to the creditor. When a value is agreed upon property turned over in payment of a debt it is the same as the payment of that much money. The case here is exactly the same in principle as where $50 is paid to a creditor to whom there was due the sum of $100. Under no circumstances and by no manner of reasoning or interpretation can this possibly, in law,

be a compromise. It can only be a payment on account. A payment of a definite amount to a creditor who owes a liquidated debt can only amount to that and no more.

And the parties themselves did not consider the transaction a compromise. Proof of this is the fact that the assets actually were turned over to the Receiver by the respondent without obtaining the approval of the Comptroller and an order of court which would have been necessary if there was in fact a compromise. Furthermore, if the parties had understood the transaction as a compromise, they certainly would have proceeded under Section 40 of the Fiduciaries Act of 1917, P. L. 447, of the Comonwealth of Pennsylvania (Purdon's Pennsylvania Statutes, Title 20 Section 787), which provides for the method of procedure to obtain the approval of the Orphans' Court where a fiduciary wishes to compromise a claim. Both sides were represented by very able counsel and it is respectfully submitted that they would have insisted upon such approval and order of court had there been a compromise. Also, receivers of national banks, and especially the one involved in this case, were very familiar with compromises and if a compromise was actually involved the requisite approval and order of court would have been obtained. In addition, promptly after the hearing before the Orphans' Court the Comptroller was informed of all the details of the transaction and even he, at that time, did not instruct the Receiver to secure a court order. Surely, under these circumstances, had there been a compromise, approval of the Comptroller and an order of court would have been obtained.

Clearly, this transaction came within the purview of the "Instructions to Bank Receivers" issued by the

Comptroller of the Currency, which appear on pages 46 and 47 of the Brief in Support of the Petition so that it was not necessary to secure the approval of the Comptroller of the Currency or an order of court. It is true that by letter dated January 7, 1935, the Comptroller authorized the Receiver to petition the court for permission to accept the assets "in full settlement of the stock assessment liability" but this was in response to a letter only asking for authority to sell some of the securities involved. Why the Receiver was so authorized and why the reply of the Comptroller was not limited to a response to the request of the Receiver to sell the securities does not appear and the writer of that letter is not now available but, in any event, it is respectfully submitted that it was a mistake on the part of the Comptroller's Office or, at best, redundant because of the said mentioned instructions issued to Receivers by the Comptroller's Office. The contention that this transaction was only a payment on account is also confirmed by the petition presented by the Receiver to the District Court of the United States for the Western District of Pennsylvania, a portion of which is set forth in R. page 7b and which reads as follows:

> "The Fidelity Trust Company of Pittsburgh, as Trustee, believing that the assessment claim of your Petitioner *should be extinguished in so far as possible,* petitioned the Orphans' Court in and for Allegheny County, Pennsylvania, at No. 205 January Term, 1932, for an order decreeing the remaining assets of the said Harper Estate to the Receiver of The Bank of Pittsburgh National Association *as payment in so far as possible* of the assessment liability as levied by the Comptroller of the Currency on October 17, 1931." (Emphasis supplied.)

It is respectfully submitted that this language which states that the assessment claim should be "extinguished in so far as possible," and that the assets should be decreed to the Receiver as "payment in so far as possible" precludes any possibility of a payment in full, especially since the decree of the court signed as a result of this petition states that the Receiver should accept the assets in accordance with the Decree of the Orphans' Court of Allegheny County, Pennsylvania, and that decree sets the values in an amount less than the assessment debt, and also since counsel for respondent in the Orphans' Court said that "the assets of the estate are several thousand dollars less than the amount sufficient to pay the Receiver of The Bank of Pittsburgh, N. A." By this language it is admitted that the facts were such that there could not possibly have been a payment in full and that there could only have been a part payment and it matters not that counsel for the Receiver, or even a court, said that the transaction resulted in full satisfaction of the claim.

The single petition to the District Court "for Leave to Compromise and Settle Assets" sought authority to make disposition of four different claims, including that against the Harper Estate. As to one of these claims, not against the Harper Estate, authority was requested "to enter into a compromise settlement" and the effect of the order of court was to approve of this request. In regard to another, again not against the Harper Estate, the petition requested that the Receiver be instructed to "release the residence property of the debtor from under the lien of his judgment" and the order of court gave effect to this request. In the case of another debtor, still not the Harper Estate, the petition and

order of court mentioned a compromise settlement but when it came to the Harper Estate, the case here involved, the petition did not in any way refer to the existence of a compromise agreement but recited that certain named securities valued at $32,759.14 were owned by the Estate and that the "Fidelity Trust Company of Pittsburgh, as Trustee, *believing that the assessment claim of your Petitioner should be extinguished in so far as possible, petitioned the Orphans' Court in and for Allegheny County, Pennsylvania, at No. 205 January Term, 1932, for an order decreeing the remaining assets of the said Harper Estate to the Receiver of The Bank of Pittsburgh National Association in payment in so far as possible of the assessment liability* as levied by the Comptroller of the Currency on October 17th, 1931. *An order, in accordance with the petition, was duly entered by the Court on May 24, 1932.*" (Emphasis supplied.) Here then we have a petition in regard to four claims. In connection with only two of them, neither of which was the Harper Estate, the term "compromise settlement" is used and, as to another, reference is made to release of property from the lien of a judgment. When we come to the Harper claim in this petition we find that it is set forth that the Respondent here then believed that the assessment claim should be "extinguished in so far as possible" and therefore petitioned the Orphans' Court for an order decreeing the assets to the Receiver "as payment in so far as possible of the assessment liability." It is further stated that an order was made in accordance with that petition. The word "compromise" is not used even once in connection with the Harper claim. Certainly, if there was any intention that the Harper assessment claim was to be compro-

mised, the Receiver would have used the word "compromise" just as he used it in connection with two of the other claims. On the contrary, however, when the case with respect to the Harper claim is presented it is said in effect that the delivery of the assets was to operate as payment of the assessment debt "in so far as possible." Clearly, this definitely means that there was only a part payment involved. And this is supported by the fact that the decree of the District Court directed the Reciever to accept the assets "in accordance with a decree of Orphans' Court in and for Allegheny County, Pennsylvania, at No. 205 January Term, 1932," and that decree of the Orphans' Court set forth the value of $30,159.58 whereas the debt was $35,654.85.

For the Court to decide that there was a compromise in this case, it is respectfully submitted that it must decide that a payment of $50 in satisfaction of a debt of $100 constitutes, in law, payment in full of the obligation. But this is contrary to all the decisions and principles of the law.

Therefore, since there was no compromise but only a part payment, the transaction between the parties was consummated and title to all the assets vested upon delivery without any necessity to secure the approval of the Comptroller of the Currency or an order of court.

In further support of the contention that title to the assets in this case vested upon delivery, reference is made to the fact that not one transfer agent questioned the transaction when the securities were presented for transfer promptly after their receipt in 1932 in pursuance of the decree of the Orphans' Court of Allegheny

County. If, under the law, title to these securities did not actually vest upon delivery in this case without the approval of the Comptroller of the Currency and an order of court certainly these transfer agents would have refused to transfer the security involved without proof of such approval and order. But there was no approval of the Comptroller of the Currency and order of court when these securities were presented for transfer and without such approval and order the transfer agent must have concluded that there was no compromise since, otherwise, they would have been necessary and the securities would not have been transferred without them. The Respondent, the Fidelity Trust Company, itself, transferred on its own books title to an installment mortgage fund and a mortgage known as the A. Shapiro mortgage without any approval of the Comptroller or order of court.

Petitioner does not argue that it is not possible to compromise the individual liability of a shareholder but does contend that, under the facts of this case, there could not possibly, in law, have been a compromise.

In conclusion, Petitioner respectfully submits:

1. That if there was a compromise in this case then the values of the assets were agreed to by the parties and the decree of the District Court was to the effect that the assets be accepted in accordance with the decree of the Orphans' Court of Allegheny County, Pennsylvania, wherein said values were placed upon each asset.

2. That there was an agreement as to the values of the assets and those assets were delivered to the Receiver in accordance with usual legal process through the

courts and therefore no approval of the Comptroller or order of court was required by reason of the Instructions to Receivers issued by the office of the Comptroller of the Currency.

3. That the transfer of the assets only represented a payment on account and therefore there was no necessity of securing the approval of the Comptroller of the Currency and an order of court. Consequently, title to the assets involved vested in the Receiver upon delivery.

4. That Respondent should be charged with interest upon the unpaid balances of the assessment to the date of the decree of the District Court on February 13, 1935 unless title to the assets should be held to have vested in the Receiver upon the date of delivery in 1932.

5. That if the vital date is taken to be February 13, 1935, as found by the United States Court of Appeals, then, on account of the value of the assets as of that date, the Court was without jurisdiction, because there could not have been a compromise.

Respectfully submitted,

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